was imminent. It is trite law that if the plaintiff is not in a financial position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction must be refused: *Morning Star Co-Operative Ltd.* v. *Express Newspapers Ltd.*[4] However, having regard to the absence of any evidence as to the expenditure incurred in such preparations, I did not think it right or fair to place any reliance on this particular ground and I accordingly disregarded it.

In all the circumstances, the application was dismissed. However, I made no order as to costs as the application was made *ex parte*.

Application dismissed.

Solicitors: *Karpal Singh & Co.*

G.S. DAVID v. GOVERNMENT OF MALAYSIA & ORS.

[O.C.J. (Abu Mansor J.) June 15, 1987]

[Kota Kinabalu – Originating Summons No. 64 of 1986]

Administrative Law – Transfer of Senior Superintendent of Prison to Tawau by Director-General of Prisons – Whether transfer invalid – Prison Ordinance 1956 (Laws of Sabah), ss. 7 & 9 – Prison Ordinance, Federation of Malaysia (No. 81 of 1952) – Federal Constitution, Arts. 144(5A) & 160.

The plaintiff was a Senior Superintendent of Prison, Sabah Prison, Kota Kinabalu. On April 28, 1986, he received a letter from the Commissioner of Prisons, Sabah informing him that he had received a directive from the Director-General of Prisons that he was to be transferred to Tawau with effect from May 1, 1986. It is alleged that the Director-General of Prisons in directing the Commissioner of Prisons, Sabah to transfer him to Tawau acted in excess of his powers and administrative authority.

Held, dismissing the plaintiff's application: (1) the plaintiff's position must remain as he had opted to join the federalised service on June 30, 1978. His position, however, was not that he had contracted out as submitted by the Senior Federal Counsel but his position was governed by an Act of Parliament (section 9(2) of the Constitution (Amendment) Act 1981);

(2) if the plaintiff by virtue of the said section 9 was deemed to be in the public service of the Federation, as he was, it was clear therefore that he was subject to Civil Service Circular No. 1 of 1978. By virtue of LN. 199 of 1965 the Sabah Prison Ordinance 1956 became Federal law with effect from Malaysia Day 1963. By the same token the department became a Federal department;

(3) when the plaintiff was offered his post on August 14, 1965, he was offered the post by the Sabah Branch of the Federal Public Services Commission;

(4) in view of the overwhelming evidence, both by his conduct and the law, he was a Federal Officer whose appointment had been made under Federation of Malaya Prison Ordinance 1952. His head of department under the Ordinance was the Director-General of Prisons;

(5) having regard to all the facts and the law before the court, the transfer order dated April 22, 1986 seeking to transfer the plaintiff to Tawau Prison issued by the second defendant was valid as being in accordance with the F.M. Prison Ordinance 1952.

Cases referred to:

(1) *Minister of Home Affairs* v. *Datuk James Wong Kim Min* [1976] 2 M.L.J. 245.
(2) *Ooi Boon Leong & Ors.* v. *Citibank N A* [1984] 1 M.L.J. 222.
(3) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31.
(4) *M.K. Retnam Holdings Sdn. Bhd.* v. *Bhagat Singh* [1985] 2 M.L.J. 212.
(5) *Assa Singh* v. *Menteri Besar, Johor* [1969] 2 M.L.J. 30.

ORIGINATING SUMMONS.

C.A. Skinner for the plaintiff.

Ms. Daphne Sebastian (Senior Federal Counsel) for the defendants.

Cur. Adv. Vult.

Abu Mansor J.: By plaintiff's originating summons dated May 19, 1986 the plaintiff prays for the following reliefs:

"1. A declaration that all officers serving in the Sabah Prison Service are subject to the Prisons Ordinance 1956. Laws of Sabah, and regulations made thereunder and that all administrative decisions relating to such officers may only be made by such persons as are empowered by the Prisons Ordinance 1956, Laws of Sabah.

2. A declaration that the Director-General of Prisons, Federation of Malaya has no power and/or authority in respect of the direction and administration of the Prison Service of Sabah.

3. A declaration that the order or directive or instruction issued by the 2nd defendant on April 22, 1986, purporting to direct the Commissioner of Prisons Sabah to transfer the plaintiff from Prison Headquarters at Kota Kinabalu to Tawau with effect from May 1, 1986, is invalid in law, *ultra vires* and of no effect.

4. A declaration that the letter of the Commissioner of Prisons Sabah dated April 28, 1986, informing the plaintiff of his transfer to Tawau pursuant to the directive or instructions issued by the 2nd defendant is invalid and not binding on the plaintiff."

It is supported by his affidavit sworn on the May 17, 1986. I heard argument on the May 15, 1987 and at the end of which I reserved judgment to a date to be fixed.

At the relevant date of the filing of this summons the plaintiff is a Senior Superintendent of Prison, Sabah Prison, Kota Kinabalu. On August 14, 1965 he was offered by the Federal Public Services Commission, Sabah Branch, appointment as an officer-in-charge, Detention Camp, Prison Department Sabah, in Division II on Scale C4,5. He accepted the offer and reported for duty on November 1, 1965.

On or about the November 15, 1966, he was promoted to the rank of Superintendent of Prison and subsequently on January 1, 1981 he was again promoted to his present position of Senior Superintendent of Prison.

On or about the April 28, 1986, plaintiff received a letter from the Commissioner of Prisons Sabah informing him that he had received a directive from the Director-General of Prisons that he was to be transferred to Tawau with effect from the May 1, 1986. It is alleged that the Director-General of Prison in directing the Commissioner of Prisons Sabah to transfer him to Tawau acted in excess of his powers and administrative authority. He therefore brought this originating summons asking for the orders prayed for.

I return to the arguments. Plaintiff's counsel referred us to the plaintiff's supporting affidavit (6). He said the substance of his complaint is in paragraph 4 wherein he stated that on April 28, 1986 he received a letter from the Commissioner of Prison Sabah informing him that he had received a directive from the Director of Prisons, Federation of Malaya, (2nd defendant), that he was to be transferred to Tawau with effect from May 1, 1986. The grounds for the complaint according to plaintiff's counsel are in paragraph 6 thereof. Counsel contends that in so directing, the 2nd defendant acted in excess of his authority.

Quite correctly, as has been submitted by plaintiff's counsel in his submission that the only dispute between the parties is the plaintiff's contention in paragraph 6 of his affidavit. While the 2nd defendant admits paragraphs 1,2,3,4 and 5 of plaintiff's affidavit he disputes paragraph 6 thereof and says that he has that power and the transfer was therefore valid.

The plaintiff's contention that 2nd defendant did not have the authority to transfer him, in paragraph 6 of his affidavit, can be summed up in one paragraph. He says the Director-General of Prisons, 2nd defendant, is defined in the Prison Ordinance, Federation of Malaya, (No.81 of 1952), as a person having control and supervision over prison and prison officers in the Federation of Malaya only. Ordinance No.81 of 1952 as amended has no application to Sabah for which the governing law, as far as prison is concerned, is the Prison Ordinance 1956, Laws of Sabah. Section 9(1) of that Ordinance 1956 says that the direction and administration of the Prison Service and all matters relating to prisons in Sabah shall be vested in the Commissioner subject to the direction of the Yang Di-Pertua Negeri. The 2nd defendant in purporting to issue a directive to the Commissioner of Prisons Sabah that plaintiff be transferred to Tawau acted with no authority and was attempting to direct the administration of the Sabah Prison Service which he has no power to do so and in so acting had exceeded the authority vested in Ordinance F.M. No.81 of 1952. The Commissioner of Prisons Sabah had not acted in accordance with Sabah Ordinance 1956 in carrying out 2nd defendant's instructions.

Perhaps we might begin by examining the powers of the Director-General of Prisons in Ordinance No.81 of 1952 and to see whether that ordinance applies to Sabah that we may find out what are his powers, if any, in relation to the administration of the prisons in Sabah. While doing so we may also examine the Sabah Prison Ordinance 1956 *vis-a-vis* the powers of the 2nd defendant to transfer the plaintiff.

Subject to what I will say later in this judgment, I do not think we can quarrel with the position of the Director-General of Prisons in the Prison Ordinance No.81 of 1952. In section 2 thereof "Director-General of Prisons, Federation of Malaya" is appointed under section 11 thereof. Counsel further submitted that by virtue of section 10(1) the Director-General is empowered to transfer officers that are under him but counsel contends his powers to transfer are restricted to prison officers in the Federation and according to Article 160 of the Federal Constitution "the Federation" means the federation established under the Federation of Malaya Agreement 1957. His contention, says the plaintiff's counsel, is clear that since the Director-General's power to direct and control only relates to prison officers in the federation established in 1957 by implication the 2nd defendant therefore

has no control over the plaintiff. We will refer to this argument later.

Plaintiff's counsel contends that as the plaintiff is not under the direction and control of the Director-General he alleged that plaintiff in fact comes under the direction and control of the Commissioner of Prisons Sabah under the Prison Ordinance Sabah (No.7 of 1956). Under the Sabah Ordinance 1956 counsel says the plaintiff is in a separate service, the North Borneo Prison Service, whose head by virtue of section 7 of the Ordinance is the Commissioner as defined thereunder and consists of such officers as may be approved by the Yang Di-Pertua Negeri. Counsel further alleged that by virtue of section 9(1) thereof the direction and administration of the Prison Service shall be vested in the Commissioner and under section 9(2) the Commissioner may make orders (which need not be gazetted) with regard to their recruitment and terms of service. Counsel submitted that the Commissioner's powers included his powers to transfer. The two Ordinances he submitted – No. 81 of 1952 and No. 7 1956 – function separately. No modification was ever made. Counsel, however, concedes that by virtue of the powers given to the Yang Di Pertuan Agong to make modification (LN. 119 of 1965), this Ordinance 1952 became Federal law and came under Item 3, Part I, of the Ninth Schedule to the Federal Constitution on Sabah becoming part of Malaysia. In the *Minister of Home Affairs* v. *Datuk James Wong Kim Min*[1], (not cited before me) Datuk Lee Hun Hoe, the Chief Justice of Borneo, had occasion to consider the position after Malaysia Day of and legal effect of the law similar to the Sabah Prison Ordinance No.7 of 1956, the Sarawak Preservation of Public Security Ordinance 1962 (PPSO) and its regulations made thereunder (PPSR) which had been by virtue of LN. 200 of 1963, made subject of a Modification Order by the Yang Di-Pertuan Agong thereby making it a Federal law, and he said:

"With respect to the learned Judge I think he is right to hold that by declaring the PPSO including its subsidiary legislation to be Federal laws under Section 74(3) of the Malaysia Act 1963 the legal effect would be to transfer the responsibility of administering the Federal law to the Federal authority and to vest on the Federal Parliament the power to amend or repeal such laws."

It is clear therefore that counsel's allegation that no modification was made was incorrect for LN.199 of 1965 was a modification and it made Sabah Ordinance No.7 of 1956 Federal law.

As regards the defendant's contention in paragraph 5 of affidavit of 2nd defendant (enclosure (11)) that the plaintiff had opted to join the Suffian Scheme and therefore is subject to Service Circular No. 1 of 1978 plaintiff's counsel contended that the service circular could not override the Sabah Ordinance 1956. If he is bound by the circular, plaintiff's counsel submitted, his head of department is still the Commissioner as in Sabah Ordinance and not the 2nd defendant. Plaintiff's counsel further said that 2nd defendant's purported exercise to transfer the plaintiff, if viewed from the standpoint of Article 144(5A) of the Federal Constitution, would be of no effect as he had not been duly delegated the powers and authority expressly by the Yang Di-Pertuan Agong the powers of the Public Services Commission regarding transfers. As for the reference in paragraph 5(ii) of enclosure (11) that the 2nd defendant is "Ketua Pengarah Penjara Malaysia" he says steps have still to be taken to bring about an integration of Sabah Prison Service with the West Malaysia Service and also with Sarawak Prison Service. He, however, concedes by virtue of LN.199 of 1965 Sabah prison officers do come under the Ministry of Home Affairs.

The Senior Federal Counsel for the defendants in reply had only one point to make that since plaintiff on June 30, 1978 had signed the option (Lampiran "F" in enclosure (13)) he made himself subject to the terms in Service Circular No.1 of 1978 (exhibit "E" in enclosure (11)) and he was fully aware of the consequences of his choice and he could not be allowed to retract. In paragraph 1.3 of exhibit "E" thereof plaintiff by opting is placed under the administration of his head of department and he can be directed to serve wherever he is so directed. She referred the court to paragraph 5 of affidavit enclosure (13) where the 2nd defendant states he was, by way of promotion on June 25, 1984 made the Ketua Pengarah Penjara, Prison Headquarters Malaysia. He said he is empowered to deal with all administrative matters including transfers. The 2nd defendant had not delegated his authority to the Commissioner Sabah and so he duly exercised the power to transfer the plaintiff. He said that the Commissioner of Prison Sabah, 3rd defendant, having also exercised the option to join the federalised service as in Circular No.1 of 1978 is also under the control and direction of the 2nd defendant she alleged.

The Senior Federal Counsel for the defendants further submitted to the court that the plaintiff's act of exercising his option to join the federalised service and agreeing to be bound by the Service

Circular No.1 of 1978 was an act of "contracting out" of the Sabah Ordinance No.7 of 1956. Such contracting out, she submitted, is legal and proper if the act is not prohibited by any statutory provision. It is her submission that the Sabah Ordinance 1956 contains no such prohibition and such prohibition has to be clearly expressed in the statute and not by implication. She cited a number of authorities where the principle was upheld that in the absence of such express prohibition contracting out had been countenanced. She cited *Ooi Boon Leong & Ors.* v. *Citibank N.A.*[2] *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo*[3] and *M.K. Retnam Holdings Sdn. Bhd.* v. *Bhagat Singh*[4] which discussed the same principle. I was of the view that these cases were of no help to us. I agree with plaintiff's counsel's reply that these cases can be distinguished in that they were instances in which private citizens were contracting out their private rights whereas if the plaintiff's act of option was to be viewed as contracting out he would be in the same position as a person bound by certain statutory duties under the Sabah Ordinance is contracting out of it and it would be against public policy. Counsel cited the example if indeed, as he alleged it to be that the plaintiff is bound under the Sabah Ordinance then he is bound, in that case, to obey the Commissioner Sabah and the Yang Di-Pertua Negeri and if he is also allowed to contract out and be required to obey the Ketua Pengarah Penjara Headquarters, the result would be chaotic and I agree that the plaintiff's act cannot be viewed as a contracting out as suggested by the Senior Federal Counsel.

What then is the court's answer to this problem posed by the plaintiff? In my considered view the answer is in the contention of the Senior Federal Counsel for the defendants that the plaintiff's position must remain as he had opted to join the federalised service on June 30, 1978. His position, however, is not that he had contracted out as submitted by the Senior Federal Counsel but his position is now governed by an Act of Parliament. By section 9(2) of Act A514 (this was not cited to us by either party) coming into effect on May 15, 1981, Parliament provided as follows:

> "(2) Notwithstanding anything in the Constitution or the Constitution of the State of Sabah or Sarawak, any member of the public services of the State of Sabah or Sarawak serving in any federal post or in any posts which have become federal posts in that State and who has exercised, in whatever manner or form, any option offered by the Federal Government to be a member of the general public service of the Federation shall be deemed to have opted and accordingly transferred to or appointed as a member of the public service of the Federation."

It has to be noted that consonant with the position the plaintiff finds himself in matters of discipline, he also comes under the jurisdiction of the Public Services Commission as Article 139(1A) (added by section 9 of Act A514 in force from May 15, 1981) reads:

> "(1A) The jurisdiction of the Public Services Commission shall extend to -
>
> (a) members of the general public service of the Federation who are employed in a Federal Department in the State of Sabah (or Sarawak);
>
> (b) ...
>
> (c) members of the public service of the State of Sabah (or Sarawak) serving in Federal posts or in any post which have become Federal posts in that State and who have exercised the option to be members of the general public service of the Federation."

Indeed it is very clear in exhibit GD.3 attached to plaintiff's enclosure (6) that it was the Federal Public Services Commission that sat to give promotion to the plaintiff from Superintendent of Prisons, Division I Scale A to Superscale J with effect from January 1, 1981. If the plaintiff by virtue of Section 9, Act A514, is deemed to be in the public service of the Federation, as he is, it is clear therefore that he is subject to Civil Service Circular No.1 of 1978. By virtue of LN. 199 of 1965 the Sabah Ordinance 1956 became Federal law with effect from Malaysia Day 1963. By the same token the department became a Federal department. When the plaintiff was offered his post on August 14, 1965, he was offered the post, as exhibit GD.1 enclosure (6) shows, by the Sabah Branch of the Federal Public Services Commission. I am of the firm opinion that in view of the overwhelming evidence, both by his conduct and the law, he is now in fact a Federal officer whose appointment had been made under Federation of Malaya Prison Ordinance 1952. His head of department under the Ordinance I duly hold to be the Director-General of Prisons Malaya appointed under section 11 thereof.

Under whose control and direction are such officers in the position of the plaintiff? Section 10(1) of the F.M. Prison Ordinance 1952 reads:

> "10(1). Subject to the provision of the Constitution and the orders of the Minister the control and direction of Prison officers throughout the Federation shall

be vested in the Director-General who may from time make such transfers and direct the employment and distribution of prison officers as he may think fit."

Having regard to all the facts and the law before me, I have no hesitation in saying that the transfer order dated April 22, 1986 seeking to transfer the plaintiff to Tawau Prison issued by the 2nd defendant through the 3rd defendant is valid as being in accordance with the F.M. Prison Ordinance 1952.

In conclusion I did say that the Sabah Ordinance 1956 is a "continuing" Federal law in which the State of Sabah has no longer powers, after Malaysia Day, to amend but in some parts there is still mentioned of the part supposed to be played by the Yang Di-Pertua Negeri. It may be observed that since the Prison Ordinance 1956 became Federal law by virtue of LN.199 of 1965 the State of Sabah has acted, I believe properly, in treating the Sabah Prison Ordinance 1956 as no other than a Federal law administered by Federal authority. It would be inconsistent and repugnant to say that the Yang Di-Pertua Negeri, the State authority, plays a part in administering the Prison Ordinance Sabah, it being already a Federal law administered by Federal authority. I am, therefore, of the view that the Prison Ordinance Sabah even if it is used, the repugnant provisions of the Ordinance tending to nullify the exercise of its powers by Federal authority, ought to be disregarded and has been so disregarded in its application and the Sabah Ordinance is therefore to be read in that light. Indeed in the *Minister of Home Affairs* v. *Datuk James Wong*[1] *(supra)* the Federal Court considered the choice of the use by the Federal authority of the PPSO Sarawak and the Internal Security Act 1960, and the Federal Court held that in matters of issuing a detention order the Federal authority could employ the use of either the Internal Security Act or the Sarawak PPSO but if the latter is employed, then such order is only effective within the State of Sarawak. In a similar way in the present case, on the same principle, the Federal authority can with the aid of Act A514, section 9, use either the Prison Ordinance 1952, and had in fact so used or the Sabah Prison Ordinance 1956 with modifications (see *Assa Singh* v. *Menteri Besar, Johor*[5]). If and when the Federal authority uses the former Ordinance the Sabah Ordinance must remain redundant in its application insofar as that part is covered by the F.M. Ordinance No.81 of 1952 or Act A514, for example, provisions on appointments, terms of service and in matters of discipline. For reasons given, I dismiss the plaintiff's originating summons with costs to be taxed.

Order accordingly.

Solicitors: *Skinner Lind Robertson Willie Wong Chin & Co.*

SUBRAMANIAM LAKSHAMANASAMY v. DATUK S. SAMY VELLU & 4 ORS.

[O.C.J. (Mohamed Dzaiddin J.) May 27 & June 22, 1987]

[Penang – Suit No. 22-50-87]

Administrative Law – Political party branch election – Ex parte injunction restraining nomination – Application to discharge injunction – Membership of branch less than required number – Exhaustion of domestic remedy – Whether injunction should be discharged.

Legal Profession – Counsel gainfully employed as Deputy Speaker of Dewan Raayat – Locus standi to appear as counsel – Practice certificate – Legal Profession Act, 1976, s.30 – Federal Constitution, arts. 57(5) & 58.

This application concerns the Malaysian Indian Congress Penang Branch elections. The plaintiff had obtained an *ex parte* interim injunction restraining the defendants, their agents or servants from receiving any nomination papers in respect of the nomination of candidates for the elections. The defendants applied to discharge the injunction. Plaintiff's counsel challenged the standing of defendants' counsel.

The issue in the plaintiff's writ was whether the defendants were acting within the Party's Constitution when they declared "defunct" the Malaysian Indian Congress Tanjong West Branch. The plaintiff contended that the said branch was wrongfully declared as "defunct." The defendants showed that 41 photocopies of the identity cards of the total members of 115 from the branch were falsified, thus reducing the membership to 71. Under article 19.12, the membership of the Branch Congress shall not be less than 100. Under article 91 of the Party Constitution, the plaintiff was precluded from resorting to court proceedings unless and until such matter was first referred to the Central Committee.

Held: (1) so long as counsel is on the roll of advocates and solicitors and has a valid practising certificate, he has an exclusive right to appear and plead in all Courts in Malaysia;

(2) the defendants had made a sufficient case for the discharge of the interim injunction;

(3) damages, if any, to be assessed by the Registrar;

(4) costs in the cause.